

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of:)	
)	
Frances S. Smith d/b/a NCN Cable)	
Advertising)	CSR-6067-M
v.)	
Cable One, Inc.)	
)	
Request for Carriage)	

MEMORANDUM OPINION AND ORDER

Adopted: May 12, 2003

Released: May 15, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Frances S. Smith d/b/a NCN Cable Advertising, licensee of low power television station WKFK-LP, Pascagoula, Mississippi ("WKFK-LP") filed the above-captioned complaint against Cable One, Inc. ("Cable One") for its failure to carry WKFK-LP on its cable systems serving the communities of Moss Point, Vancleave, Ocean Springs, Gautier, Escatawpa, Pascagoula and unincorporated Jackson County, Mississippi. An opposition to this complaint was filed on behalf of Cable One to which WKFK-LP replied. For the reasons discussed below, we grant WKFK-LP's complaint.

II. BACKGROUND

2. Both the Communications Act of 1934, as amended, and the Commission's rules require the carriage of "qualified" low power television ("LPTV") stations in certain limited circumstances.¹ An LPTV station that conforms to the rules established for LPTV stations in Part 74 of the Commission's rules will be considered "qualified" if: (1) it broadcasts at least the minimum number of hours required pursuant to 47 C.F.R. Part 73; (2) it adheres to Commission requirements regarding non-entertainment programming and employment practices, and the Commission determines that the programming of the LPTV station addresses local news and informational needs that are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license; (3) it complies with interference regulations consistent with its secondary status; (4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; (5) the community of license of the station and the franchise area of the cable system were both located outside the largest 160 Metropolitan Statistical Areas ("MSAs") on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and (6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable

¹47 U.S.C. § 534(c)(1); 47 C.F.R. § 76.56(b)(3).

system.²

III. DISCUSSION

3. In support of its complaint, WKFK-LP states that, by letter dated September 9, 2002, it elected must carry status on Cable One's system for the election cycle beginning on January 1, 2003.³ Cable One responded on September 19, 2002, requesting additional information to determine if WKFK-LP met the six qualifications for carriage.⁴ WKFK-LP states that, on October 23, 2002, Cable One formally denied WKFK-LP carriage on its cable system.⁵ WKFK-LP states that it filed the instant complaint within 60 days of that denial.

4. Although WKFK-LP filed its complaint within 60 days of Cable One's denial of its election of carriage, it should be noted that the Commission's rules contain a two-part must carry process. Section 76.64(f)(2) of the Commission's rules requires that television broadcast stations make an election between must carry and retransmission consent status every three years.⁶ This WKFK-LP did in its September 9, 2002 letter to Cable One. Such a letter, however, is merely an election notice and not a demand for carriage pursuant to Section 76.61(a)(1) of the Commission's rules.⁷ Cable One's October 23, 2002 denial of carriage, therefore, was premature and would not have triggered the 60-day complaint cycle under Section 76.61(a)(5)(i) of the rules.⁸ However, because the parties have raised arguments relative to the must carry status of WKFK-LP on Cable One's system, we will treat this as a formal must carry complaint and will not dismiss WKFK-LP's complaint as untimely filed.

5. There are four arguments raised by Cable One revolving around the issue of the provision of local programming. First, Cable One maintains that WKFK-LP does not provide sufficient local programming to the subject communities. Second, Cable One maintains that WKFK-LP has failed to show that the other local full-power television stations do not provide adequate local programming to the communities at issue. Third, Cable One maintains that the local full-power stations it carries provide more than sufficient programming to address the news and informational needs of the communities. Fourth, Cable One maintains that the fact that there are nearby local full-power television stations that serve the communities makes WKFK-LP ineligible for carriage. We will take each issue in turn.

6. Cable One argues that WKFK-LP primarily airs programming provided by PAX Network and has failed to meet its burden in demonstrating that it provides sufficient local programming to the communities, as required by Section 614(h)(2)(B) of the Act.⁹ It asserts that the local programming listings submitted by WKFK-LP do not delineate scheduling information so there is no way to determine the amount of this programming in relation to the PAX programming to which the station devotes the majority of its time.¹⁰ Moreover, Cable One states that WKFK-LP's programming examples refer primarily to Pascagoula, with little or no examples for the other communities at issue. Our review of the programming schedules submitted by WKFK-LP, however, demonstrates that it provides local news and

²47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d).

³Complaint at Exhibit A.

⁴*Id.* at Exhibit B.

⁵*Id.* at Exhibit D.

⁶47 C.F.R. § 76.64(f)(2).

⁷47 C.F.R. § 76.61(a)(1).

⁸47 C.F.R. § 76.61(a)(5)(i).

⁹Opposition at 2, citing Complaint at Exhibit F; *see also* 47 U.S.C. § 534(h)(2)(B).

¹⁰Opposition at 2, citing Complaint at Exhibit F.

informational programming relevant to the communities. Specifically, WKFK-LP broadcasts a minimum of 2 hours of locally-focused programming every weekday evening, and a 24-hour crawl at the bottom of the television screen providing local information.¹¹ Contrary to Cable One's assertions, the programming information provided by WKFK-LP clearly delineates scheduling times and includes examples that specifically reference all but two of the communities at issue. Because these two communities, Vancleave and Ocean Springs, appear to be separate physical systems and WKFK-LP does not appear to be providing local news and information for these communities, we will deny WKFK-LP's request for mandatory carriage in these communities. Finally, while it is true that PAX-affiliated programming in general would not be considered locally-oriented, the mere fact that WKFK-LP is a PAX affiliate does not automatically negate WKFK-LP's ability to meet the local programming requirements of Section 614(h)(2).

7. WKFK-LP argues that, pursuant to Section 76.55(d) of the Commission's rules, the LPTV station must make a *prima facie* showing that its local programming meets the news and informational needs of the cable system subscribers and then the burden shifts to the cable operator to show that the neighboring full-power stations adequately provide subscribers with local programming.¹² Cable One asserts that WKFK-LP is mistaken that it has met its burden just because it provides more locally-focused programming than the full-power television broadcast stations.¹³ We agree with WKFK-LP that, once an LPTV station has demonstrated that it is providing locally-focused programming directed to the communities, the cable operator has the responsibility to show that the full-power stations carried by the cable system also provide locally-focused programming directed to the communities. *American Television*, for example, found that general assertions by a cable system that full-power stations carry stories addressing local issues was not sufficient in light of the LPTV station's showing of programming directed to the communities.¹⁴ We continue to believe that the cable operator is in the best position to know what local programming is being carried on its cable system from the full-power stations it carries and to offer this evidence to support its refusal to carry the LPTV station.

8. Cable One claims that the local full-power television stations it carries provide sufficient local programming to serve the communities as part of their regularly scheduled local news.¹⁵ WKFK-LP states that Cable One provides only 17 examples of stories aired over three years by the full-power stations, which is a small fraction of the stories WKFK-LP covers in any given month.¹⁶ Moreover, most of Cable One's examples appear to cover Pascagoula and its environs only superficially and not to the depth that WKFK-LP provides.¹⁷ We find that the evidence offered by Cable One to show the locally-focused programming provided by the full-power television stations it carries is minimal. The information provided appears to have been taken from the various stations' websites, rather than television listings. It is not quantified, and we cannot determine how much, if any, of the stations' programming actually is directed to the communities at issue.

9. Cable One asserts that WKFK-LP is ineligible for carriage because there are nearby full-

¹¹Complaint at Exhibits F-I.

¹²Complaint at 4, citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2982 (1993) ("Must Carry Order"); *American Television, Inc. v. Charter Communications, LLC*, 14 FCC Rcd 8842, 8846 (1999).

¹³Opposition at 6, citing Complaint at 4-5.

¹⁴See *American Television*, 14 FCC Rcd at 8846.

¹⁵Opposition at Exhibits B and D.

¹⁶Reply at 2, citing Opposition at Exhibit B.

¹⁷*Id.* at 3-4.

power television stations that serve the subject communities. Cable One maintains that, even if the Commission finds that the LPTV is providing locally-oriented programming serving the communities and that the local full-power stations are not adequately providing local programming to these communities, it must still deny carriage to the LPTV station if the local full-power stations are not “distant” from the LPTV station’s community of license.¹⁸ Cable One states that the distance between Pascagoula, WKFK-LP’s city of license, and the full-power stations ranges from 19.8 to 38.1 miles and most of the full-power stations provide Grade B or better coverage to the communities.¹⁹ WKFK-LP argues that the issue of distance with regard to LPTV stations’ qualifications is not measured in miles but in how the distance of a full-power station inhibits it from adequately providing coverage of the issues facing the community of the LPTV station.²⁰ WKFK-LP asserts that the small amount of programming that is actually directed to the subject communities by the full-power stations more than illustrates this point.

10. We find that Cable One’s reading would stand the statute on its head and defeat the purpose of requiring carriage of LPTV stations that are providing locally-focused programming. Cable One argues that, if a full-power station is “close” to the LPTV station’s community of license but “does not currently serve the local news and informational needs of residents in each community, the LPTV station would not satisfy all the [statutory] elements . . .”²¹ Cable One overlooks the proper emphasis on whether the full-power station is providing locally-oriented programming and contends that the issue is whether the *reason* for a full-power station’s failure to adequately serve the LPTV’s community is its distance from the LPTV station’s community of license.²² This approach ignores the more logical focus on whether and how much local programming the LPTV station is providing to the LPTV station’s community, and whether the full-power stations are providing similar programming. Moreover, Cable One’s reading would render superfluous the language in the statute that expressly applies a geographic parameter to carriage of LPTV stations. Section 614(h)(2)(F) provides that a LPTV station is not entitled to mandatory carriage if there is a full-power station licensed to any community within the county or other State subdivision served by the cable system.²³ For Section 614(h)(2)(F), it is irrelevant if the full power station licensed to the community is not providing locally-focused programming; such proximity is sufficient. If, in Section 614(h)(2)(B), we look only at the distance and ignore the local programming component, we would subvert the relevant emphasis of 614(h)(2)(B) and create a potential conflict with Section 614(h)(2)(F).

11. The statutory language does not require the illogical result advanced by Cable One. The better reading, suggested by WKFK-LP, is that the subordinate clause is not a requirement, but rather an explanation that, although a full-power station may be “local” to the communities in question, because it is more distant than the LPTV station, it is understandable that it may lack locally-focused programming.²⁴ Overall, the more persuasive reading of this statutory language is that, if a full-power station is providing adequate locally-focused programming, then the cable system need not carry the LPTV station. If, on the other hand, the full-power stations are not providing locally-focused programming, and the LPTV station is, then the LPTV station is entitled to mandatory carriage.

12. Even if we were to accept Cable One’s argument and focus on “distance” to excuse

¹⁸Opposition at 2.

¹⁹*Id.* at 8 and Exhibit F.

²⁰Reply at 8-9.

²¹Opposition at 2.

²²*Id.* at 8.

²³47 U.S.C. § 534(h)(2)(F).

²⁴*See* Complaint at 12, n.7.

inadequate locally-focused programming, the result here would not change. In this case, Cable One argues that Pascagoula, Mississippi is 19.8 to 32.1 miles from full-power stations in Mississippi and 38.1 miles from full-power stations in Alabama, which would not make them distant for other provisions of the statute.²⁵ There is no dispute that WKFK-LP is closer to Pascagoula, Moss Point, Gautier, Escatawpa, and the unincorporated areas of Jackson County than are any of the full-power stations. The statute does not define “distant” for these purposes, and the full-power stations are certainly more distant than is WKFK-LP. Thus, given that we find that WKFK-LP provides locally-focused programming to Pascagoula and nearby communities, and that Cable One has not demonstrated that the full-power stations provide such locally-focused programming to these communities, we conclude that WKFK-LP meets the statutory requirements in Section 614(h)(2) and is entitled to mandatory carriage on the cable systems in Pascagoula, Moss Point, Gautier, Escatawpa, and the unincorporated areas of Jackson County.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Sections 76.55(d) and 76.56(b)(3) of the Commission’s rules, that the complaint filed by Frances S. Smith d/b/a NCN Cable Advertising **IS GRANTED** with respect to the communities of Moss Point, Pascagoula, Gautier, Escatawpa and the unincorporated areas of Jackson County, Mississippi.²⁶ Cable One, Inc. **IS ORDERED** to commence carriage of WKFK-LP within sixty (60) days of the release date of this order.

14. **IT IS FURTHER ORDERED** that the complaint filed by WKFK-LP with respect to the communities of Vancleave and Ocean Springs, Mississippi **IS DENIED**.

15. **IT IS FURTHER ORDERED** that WKFK-LP shall notify Cable One in writing of its channel position election within thirty (30) days of the release date of this order, pursuant to Sections 76.57 and 76.64(f) of the Commission’s rules.²⁷

16. This action is taken pursuant to authority delegated by Section 0.283 of the Commission’s rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

²⁵Opposition at 8. Cable One argues that these mileages are not “distant” for purposes of market modifications. That analogy is not relevant here as there is no request to delete the cable systems from these full power stations’ market.

²⁶47 C.F.R. §§ 76.55(d) and 76.56(b)(3).

²⁷47 C.F.R. §§ 76.57 and 76.64(f).

²⁸47 C.F.R. § 0.283.